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THE RELIGIOUS EXEMPTION DEBATE

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I. A BRIEF HISTORICAL REVIEW

The United States claims religious liberty as one of its great contributions to the world, but we cannot seem to agree on what that means. American debates over religious liberty have had remarkable persistence. Political fights over religious observance in public schools date to the creation of the public school system in the second quarter of the nineteenth century.[2] Debates over public funding of religious education started about the same time.[3] Those are the Johnny-come-lately issues.

Debates over exempting religiously motivated behavior from government regulation have continued off and on since the seventeenth century.[4] The colonies exempted Quakers from swearing oaths and exempted dissenters from paying taxes to support the established church. They exempted members of pacifist faiths from bearing arms in person, although those conscientious objectors had to perform alternative service or pay extra taxes to support the war effort. Military service was as important then as it is now, and more dependent on compulsory service, so this last exemption was the subject of much political debate.[5]

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[2] *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–305 (2001).
[3] *See id.*
[4] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006).
[5] These debates are extensively reviewed in McConnell, *supra* note 4, at 1468–69, 1500–03, and Laycock, *supra* note 4, at 1808–25.

The exemption issue arose intermittently in the antebellum state courts, with cases going both ways,[6] and in the United States Supreme Court in the late nineteenth and early twentieth centuries, where the religious claimants lost.[7] The issue eventually appeared to be settled by the Warren and Burger Courts, in *Sherbert v. Verner*[8] and *Wisconsin v. Yoder*.[9] Large majorities in those cases held that the Free Exercise Clause requires a compelling government interest to justify any government-imposed burdens on the exercise of religion. The settlement, however, was short lived.

The Reagan Administration saw the *Sherbert-Yoder* rule as a prime example of judicial activism. Reagan did not run on the issue, and his advisers did not want the evangelical part of his base to know what they were doing, but his Justice Department initiated the current round of the exemptions debate, quietly hammering at the Free Exercise Clause in briefs to the Supreme Court.[10] That effort bore fruit after Reagan left

[6]*Compare* Commonwealth v. Cronin, 1 Q.L.J. 128 (Va. Cir. Ct. 1856) (exempting a priest, on constitutional grounds, from testifying to what victim had said in her final confession); and People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813) (exempting priest, on state constitutional grounds, from testifying to what defendants had said in confession), excerpts reprinted in *Privileged Communications to Clergyman*, 1 CATH. LAW. 199, 199–209 (1955); *with* Philips v. Gratz, 2 Pen. & W. 412 (Pa. 1831) (rejecting claim to exemption from civil trial on the Jewish sabbath); State v. Wilson, 13 S.C.L. (2 McCord) 393 (S.C. Const. App. 1823) (refusing an exemption from grand jury service); and Commonwealth v. Wolf, 3 Serg. & Rawle 48 (Pa. 1817) (rejecting claim to exemption from law enforcing the Christian Sabbath). *See also* Commonwealth v. Drake, 15 Mass. (14 Tyng) 161 (1818) (admitting in criminal trial a confession to members of the defendant's church, without stating any general rule on right to exemptions).

[7]Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws); United States v. McIntosh, 283 U.S. 605, 623–24 (1931) (military service) (dictum); Selective Draft Law Cases; 245 U.S. 366, 389–90 (1918) (military service); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Reynolds v. United States, 98 U.S. 145, 161–67 (1878) (polygamy).

[8]374 U.S. 398 (1963) (holding that a Seventh-day Adventist could not be denied unemployment compensation because of her refusal to work on her Sabbath).

[9]406 U.S. 205 (1972) (holding that Amish parents who provided vocational education on the farm could not be required to send their children to public high school).

[10]Reagan Administration briefs are collected in Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 259 n.42 (2009).

office. *Employment Division v. Smith* distinguished *Sherbert* and *Yoder*, interpreting those precedents narrowly and shrinking the scope of the Free Exercise Clause.[11]

Smith triggered a fierce political reaction, which made the exemptions debate far more contentious than it had ever been before. The modern debate has been more public, although it still gets remarkably little attention from the press. Congress enacted a series of statutes to protect religious liberty: the Religious Freedom Restoration Act,[12] the American Indian Religious Freedom Act Amendments,[13] the Religious Liberty and Charitable Donation Protection Act,[14] and the Religious Land Use and Institutionalized Persons Act.[15] Fifteen states enacted state Religious Freedom Restoration Acts,[16] and many state courts have interpreted their state constitutions to mean something more like *Sherbert-Yoder* than like *Smith*.[17] *Smith* is still the law of the federal Free Exercise

[11]494 U.S. 872, 882–85 (1990).
[12]Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §2000bb to 2000bb-4 (2006)). Originally the Act protected exercises of religion against all American governments. As amended, it protects exercises of religion only against the federal government and its instrumentalities.
[13]Pub. L. No. 103–344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. §1996a (2006)) (protecting religiously motivated peyote use by Native Americans).
[14]Pub. L. No. 105–183, 112 Stat. 517 (1998) (amending 11 U.S.C. §§ 544, 546, 548, 707, 1325 (2006)) (protecting charities from suits by trustees in bankruptcy seeking to recover contributions by donors who later went bankrupt).
[15]Pub. L. No. 106–274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §2000cc to 2000cc-5 (2006)).
[16]ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. § 41–1493 to 41–1493.02 (West 2004); CONN. GEN. STAT. ANN. § 52–571b (West 2005); FLA. STAT. ANN. §§ 761.01 to 761.05 (West 2005); IDAHO CODE ANN. §§ 73.401 to 73.404 (2006); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2001 & Supp. 2009); MO. ANN. STAT. §§ 1.302 to 1.307 (West Supp. 2009); N.M. STAT. ANN. §§ 28–22–1 to 28–22–5 (West 2008); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2001); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West Supp. 2009); R.I. GEN. LAWS §§ 42–80.1–1 to 42.80.1–4 (2009); S.C. CODE ANN. §§ 1–32–10 to 1–32–60 (2008); TENN. CODE ANN. §4–1–407 (LexisNexis Supp. 2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to 110.012 (Vernon 2005); VA. CODE ANN. § 57–2.02 (LexisNexis 2007 & Supp. 2009).
[17]*See* Larson v. Cooper, 90 P.3d 125, 131 & n.31 (Alaska 2004) (requiring "substantial threat to public safety, peace or order or where there are competing state interests of the highest order"); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 445–51 (Ind. 2001) (protecting religious conduct against material burdens, but not formulating a standard for justifying such burdens); State v.

Clause, and it has now been the law for longer than *Wisconsin v. Yoder* was the law, at least in the original understanding of *Yoder*. But there are many other sources of law more protective of free exercise, so *Smith* is the effective law in fewer than half the states. On the other hand, most of the new state provisions are relatively untested.

There is also a split in the circuits over what *Smith* actually means. *Smith* says that neutral and generally applicable laws are not subject to judicial review under the Free Exercise Clause, but if a law burdens religion and is not neutral, or is not generally applicable, then the burden on religion must be justified by a compelling government interest.[18] So what counts as a generally applicable law? Some courts have said that all

Evans, 796 P.2d 178 (Kan. Ct. App. 1990) (requiring compelling interest and least restrictive means); Ky. State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (limiting state's power to regulate private schools); Rasheed v. Comm'r of Correction, 845 N.E.2d 296, 302–03, 308 (Mass. 2006) (requiring state "interest sufficiently compelling to justify" burden on religious exercise and proof that a religious exception would "unduly burden that interest"); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998) (requiring compelling interest), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999); State v. Hershberger, 462 N.W.2d 393, 396–99 (Minn. 1990) (requiring compelling interest and least restrictive means); In re Brown, 478 So. 2d 1033, 1037–39 & n.5 (Miss. 1985) (requiring compelling interest); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1276–77 (Mont. 1992) (requiring interest of the highest order and not otherwise served); Catholic Charities v. Serio, 859 N.E.2d 459, 465–68 (N.Y. 2006) (religious practice protected against unreasonable interference); In re Browning, 476 N.E.2d 465 (N.C. Ct. App. 1996) (requiring compelling interest); Humphrey v. Lane, 728 N.E.2d 1039, 1043–45 (Ohio 2000) (requiring compelling interest and least restrictive means); State ex rel. Swann v. Pack, 527 S.W.2d 99, 107, 111 (Tenn. 1975) (requiring compelling interest); City of Woodlinville v. Northshore United Church of Christ, 211 P.3d 406, 410 (Wash. 2009) (requiring "a narrow means for achieving a compelling goal"); Coulee Catholic Schs. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 884–87 (Wis. 2009) (requiring compelling interest and least restrictive alternative, except that with respect to hiring and firing employees with ministerial functions, the constitutional protection is absolute); *see also* Lower v. Bd. of Dirs. of Haskell County Cemetery Dist., 56 P.3d 235, 244–46 (Kan. 2002) (quoting the *Smith* standard but applying pre-*Smith* standard). *But see* Appeal of Trotzer, 719 A.2d 584, 589 (N.H. 1998) (applying the state's adoption of the *Smith* standard); State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 761–62 (Tenn. Ct. App. 2001) (concluding, without analyzing the standard applied in *Swann v. Pack*, that state Free Exercise Clause provides no more protection than federal Free Exercise Clause); Office of Child Support ex rel. Stanzione v. Stanzione, 910 A.2d 882 (Vt. 2006) (reserving the issue of what the Vermont Free Exercise Clause means).

[18]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993); Smith, 494 U.S. at 878–84.

laws are generally applicable unless they were enacted with anti-religious motive or single out religion for uniquely disadvantageous treatment.[19] Other courts, most notably for this audience the Third Circuit, have said that a law that is generally applicable is a law that applies to everybody. If a law has a secular exception that undermines its purpose, then it must also have a religious exception—or a compelling reason why not.[20]

There is only one Supreme Court decision since *Smith* that casts any light on the meaning of neutral and generally applicable—*Church of the Lukumi Babalu Aye v. City of Hialeah*.[21] There are facts and language in *Smith* and in *Lukumi* to support either the singling-out interpretation or the Third Circuit's one-secular-exception interpretation.[22] There is very little to support the bad-motive interpretation, and seven Justices refused to join a bad motive opinion in *Lukumi*,[23] but that has not stopped government lawyers from arguing for it, or some lower courts from adopting it.

All this legislation and litigation has sustained a serious academic debate about religious exemptions from regulation. This round of the debate is now approaching its

[19]*See* Am. Family Ass'n v. FCC, 365 F.3d 1156, 1171 (D.C. Cir. 2004); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 701–02 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

[20]*See* Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 241–43 (3d Cir. 2008); Blackhawk v. Pennsylvania, 381 F.3d 202, 207–12 (3d Cir. 2004); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235 (11th Cir. 2004); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297–99 (10th Cir. 2004); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165–68 (3d Cir. 2002); Fraternal Order of Police v. City of Newark, 170 F.3d 359, 364–66 (3d Cir. 1999). *But see* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007) (characterizing *Blackhawk* as "perhaps an overstatement.").

[21]508 U.S. 520 (1993).

[22]*See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200–13 (2004) (carefully analyzing both opinions).

[23]*See* Lukumi, 508 U.S. at 522, 540–42 (part II.A.2 of the opinion, relying on the city's bad motive, joined only by Justice Stevens and Justice Kennedy).

thirtieth year, counting from those first briefs filed by the Reagan Justice Department, or its twentieth year, counting from *Smith*.

II. WHAT IS AT STAKE

The disagreement is about cases in which one of America's remarkably diverse religious practices comes into conflict with one of its diverse and remarkably pervasive regulatory laws. Whether and when to exempt religious practices from regulation is the most fundamental religious liberty issue in the United States today. What is at stake in the debate over religious exemptions is whether people can be jailed, fined, or otherwise penalized for practicing their religion in the United States in the twenty-first century. This issue arises in widely varied contexts instead of a few recurring patterns, so it is hard for the press to cover. Here are some examples, nearly all from real controversies, and the rest from real regulatory threats:

Can a city prohibit believers in Santeria from sacrificing small animals, which is the central ritual of their faith?[24]

Can the federal government punish religious use of a tea that contains a mild hallucinogen and is part of the central ritual of a faith?[25]

[24]*See* Lukumi, 508 U.S. 520 (protecting the practice against laws that were not neutral and generally applicable); Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009) (relying on the Texas Religious Freedom Restoration Act to protect the practice against laws that the city claimed were neutral and generally applicable).
[25]*See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (protecting the practice under the federal Religious Freedom Restoration Act).

Can a city designate a church as a landmark and refuse to permit any expansion of the building, even though the church is regularly turning people away from Mass?[26]

Can a trustee in bankruptcy force churches to repay contributions, made in good faith by donors who subsequently went bankrupt, for the benefit of the donor's creditors?[27]

Can a city police department require its officers to be clean shaven, forcing Muslim officers to resign or to violate what they understand to be a religious duty?[28]

Can zoning authorities exclude the Metropolitan Community Church from a city, probably because of the city's hostility to the church's mission to gay and lesbian Christians (but of course that motive would be hard to prove)?[29]

Can zoning authorities exclude a Methodist church from a city, on the basis of resistance to church tax exemptions or vague claims about traffic?[30]

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[26]*See* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the federal Religious Freedom Restoration Act as applied to the states and not deciding the validity of the ban on expanding the building). The case eventually settled. For an account of the facts and the settlement, see Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 780–91 (1998).

[27]*See, e.g.*, Christians v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir. 1998) (protecting the church under the federal Religious Freedom Restoration Act); Morris v. Midway S. Baptist Church, 203 B.R. 468 (D. Kan. 1996) (refusing protection under either RFRA or the Free Exercise Clause). There were vast numbers of these cases, with the trustees in bankruptcy winning more than they lost, in part because the issue had to be litigated in the bankruptcy courts. The issue was eventually resolved in favor of the churches (and any other charities affected) by the Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105–183, 112 Stat. 517.

[28]*See* Fraternal Order of Police, 170 F.3d at 364–66 (protecting the Muslim officers because the city had an exception for officers with a medical reason not to shave, thus making its rule less than generally applicable).

[29]This was an unlitigated dispute in Texas that figured prominently in opposition to what became the Texas Religious Freedom Restoration Act. The dispute is very briefly described in Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 761 n.18 (1999). *See also id*. at 760, 770–72, 775–82 (summarizing other examples and evidence of churches excluded for discriminatory or hostile reasons); Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 8 n.34 (1998) (collecting examples involving Jehovah's Witnesses, Orthodox Jews, and Hare Krishnas).

Can suburban authorities prohibit a church from replacing its 36-square-foot sign, on its frontage facing an interstate highway, with a 250-square-foot sign?[31]

Can authorities penalize a church that refuses to perform gay weddings? So far, this is just a much discussed hypothetical rather than a real case.

Can authorities penalize a religious association that refuses to let its gazebo be used for a same-sex civil commitment ceremony?[32]

Can the state refuse a driver's license to a Christian woman who wants no graven image (i.e., no photograph) on her license,[33] or to a Muslim woman who is willing to be photographed only while wearing her veil?[34]

Can a school board refuse to allow Muslim girls to wear long sweat pants, instead of shorts, in coed gym classes?[35]

Can prison authorities refuse to provide kosher meals to Jewish prisoners?[36]

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[30]*See* Laycock, *supra* note 29, at 756–59, 761–65, 772–78 (collecting examples of zoning resistance to all churches).

[31]*See* Trinity Assembly of God v. People's Counsel, 962 A.2d 404 (Md. 2008) (refusing to permit the larger sign).

[32]A New Jersey administrative agency held that a Methodist organization violated the public accommodation laws when it refused to rent a beachfront pavilion to a lesbian couple for a same-sex commitment ceremony. *Lesbian Pair Wins Ruling over Refusal of Ceremony*, N.Y. TIMES, Dec. 30, 2008, at A22. *See also* Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, 2007 WL 3349787 (D.N.J. Nov. 7, 2007), *aff'd in part*, 339 Fed. Appx. 232 (3d Cir. 2009) (reciting the facts and dismissing the religious association's federal complaint in part, on the basis of *Younger* abstention).

[33]*See* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (ordering state to issue the driver's license), *aff'd by an equally divided court*, Jensen v. Quaring, 472 U.S. 478 (1985).

[34]*See* Freeman v. State Dept. of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006) (refusing the license).

[35]*Cf.* Mitchell v. McCall, 143 So. 2d 629 (Ala. 1962). Plaintiff was a conservative Christian, and the class was not co-ed. She was apparently allowed to wear her street clothes, but was not allowed to refuse to participate.

As these examples illustrate, there are endless variations in religious commitments, and endless variations in regulation. Some of the laws at issue are important. Some are trivial. Some are stupid. Some of the religious commitments are central to the faith; some are marginal. Some seem sympathetic to outside observers; some seem incomprehensible; some seem repulsive.

Another reason the issue of religious exemptions gets less public attention than Establishment Clause issues is that it splits both left and right, so that neither side campaigns on it. Religious conservatives tend to think that exemptions for religious practice are central to religious liberty;[37] secular conservatives tend to think that any right to religious exemptions encourages judicial activism.[38] Civil libertarian liberals think that religious exemptions are a core civil liberty;[39] anti-religious liberals think that they provide preferential treatment for a mostly conservative interest group.[40] And all sides tend to waffle in application, depending on what they think of the competing secular interest. Religious conservatives, religious liberals, and secular civil libertarians made up

[36]There is a vast amount of litigation about kosher, halal, and other religious diets in prisons. *See, e.g.*, Baranowski v. Hart, 486 F.3d 112, 125–26 (5th Cir. 2007) (finding compelling interest in not spending money to supply kosher diet).

[37]*See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

[38]*See, e.g.*, Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1 (1996). Fear of judicial activism was the central theme of the opinion in *Smith*, 494 U.S. 872, written by a religious conservative, Justice Scalia, who went with the secular conservatives on this issue.

[39] *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

[40] *See, e.g.*, Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996).

the wall-to-wall coalition that supported the Religious Freedom Restoration Act.[41] That coalition broke apart in the late 1990s over the question whether civil rights in general, and gay rights in particular, are such compelling interests that they universally trump any claim of religious liberty, in any context, without regard to the facts of individual cases.

For the religious believers—especially the believers whose faith is at odds with the culture—and for the civil libertarians, the argument for religious exemptions is simple and straightforward. There can be no coherent understanding of religious liberty without the right to actually practice your religion. When the state says, "You can believe whatever you want but you can never act on it," that is not religious liberty, and it is certainly not the free *exercise* of religion. "Exercise," now and in the Founders' time, means actions and conduct.[42]

More fundamentally, religious liberty that does not include the right to actually practice the religion does not solve the problem that religious liberty was designed to solve. The most obvious problem was conflict and human suffering for sake of conscience; people were penalized for things they were unwilling to give up because they believed them to ordained by God. If Massachusetts says, as it once did,[43] that Quakers are banned from the jurisdiction, that is a violation of religious liberty. If Massachusetts says, "OK, you can live here, but you have to attend the established Congregational

[41]*See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 n.9 (1974) (listing the members of the Coalition).
[42]*See* McConnell, *supra* note 4, at 1488–89 (collecting definitions from dictionaries in the founding era).
[43]*See* THOMAS J. CURRY, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 21–22 (1986); Laycock, *supra* note 4, at 1805 & n.54 (collecting statutes from the mid-seventeenth century).

worship service, and you can't have public worship of your own," that does not solve the problem. A conscientious Quaker still cannot live in Massachusetts. Now suppose Massachusetts says, "Alright, we'll waive the explicitly religious requirements. You can live here, and you can conduct your Quaker meetings, but you have to serve in the military, and you can't testify in court unless you swear an oath." It still has not solved the problem. A conscientious Quaker cannot serve in the military, and he cannot swear an oath, and if he can't testify in court, his neighbors can cheat him or steal from him at will, knowing he can never testify against them. So he still can't live in Massachusetts, and if he tries, he will be in frequent conflict with the state. Bans on practices central to a faith are equivalent to a ban on adherents. Meaningful religious liberty requires allowing people to practice their faith, not just to believe it.

This is the core of the argument for regulatory exemptions, although this core is so obvious to supporters of exemptions that it is not explicitly stated as often as it should be. There is much more to be said about constitutional text, original understanding, historical practice and experience, judicial doctrine, practicality and implementation, and all the other modes of constitutional argument.[44] But the core of the argument is that bans on important religious practices are equivalent to a ban on adherents. Even bans that are neutral and generally applicable in form are experienced as religious persecution by the victims, and because resistance provokes reaction, even bans that appear neutral and

[44]*See, e.g.*, Boerne, 521 U.S. at 545–65 (O'Connor, J., dissenting); McConnell, *supra* note 37; James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

legitimately motivated at the outset can easily transform into active and aggressive persecution by enforcers of the law.

The text of the Constitution applies to all forms of religious practice, central or peripheral. Still, the argument against oppression is strongest with respect to the most important religious practices, and weaker with respect to marginal practices that believers might be willing to give up. But the importance of religious practices varies from person to person, and is difficult for courts to assess. The Court is right that it would be a mistake to hold that practices central to a religion are constitutionally protected and that practices below some threshold of centrality are not constitutionally protected.[45] A far better rule is that all exercise of religion is constitutionally protected, but that less weighty government interests can justify burdens on less weighty religious practices. A threshold requirement of centrality would be an all-or-nothing rule; it would treat a continuous variable—religious significance—as though it were a dichotomous variable, and it would thereby greatly magnify the consequences of the inevitable errors in assessing religious significance. Such a threshold requirement would wholly deny protection, instead of according somewhat less protection, when religious significance is somewhat underestimated.[46] But the impossibility of fairly administering a threshold requirement of centrality does not mean that the courts should wholly ignore the importance of the religious practice when they are asked to decide a claim to exemption. The compelling interest test is best understood as a balancing test with the thumb on the

[45]Smith, 494 U.S. at 886–87.
[46]*See* Laycock, *supra* note 44, at 31–33.

scale in favor of protecting constitutional rights. The best way to formulate the question is whether the government interest compellingly outweighs the religious interest. The compelling interest test is not often formulated that way, but I think that it must operate that way in practice, and sometimes in the course of applying the test, the Court seems to say as much.[47] To borrow and correct Justice Scalia's example, it is easier for the government to justify a ban on throwing rice at weddings than to justify a ban on getting married in church.[48]

III. THE ARGUMENT AGAINST EXEMPTIONS

A. THOSE WHO WOULD PROHIBIT ALL EXEMPTIONS

The argument *against* religious exemptions is more diverse; people oppose exemptions for different reasons. Some opponents appear to say that any exemption for

[47]*See* O Centro, 546 U.S. at 436 (stating that Congressional finding that the compelling interest test "is a workable test for striking sensible balances between religious liberty and competing . . . governmental interests" is a determination that "finds support in our cases."); Denver Area Educ. Telecom. Consortium, Inc. v. FCC, 518 U.S. 727, 740 (1996) (stating that the "essence" of free speech protection is that "Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required," and that these principles have been "adapted to the balance of competing interests."); Lukumi, 508 U.S. at 530 (describing the district court's application of the compelling interest test as "[b]alancing the competing governmental and religious interests."); Osborne v. Ohio, 495 U.S. 103, 108–09 (1990) (finding the "exceedingly modest" interest in possessing child pornography outweighed by the interest in deterring "the exploitative use of children."); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (noting that denial of tax benefits would not "prevent . . . schools from exercising their religious tenets," and concluding that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."). Of course such compelling-interest balancing can be done well or badly. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1306–08 (2007) (reviewing cases of "strict scrutiny as a weighted balancing test").

[48]*Cf.* Smith, 494 U.S. at 887 n.4 (asserting that dispensing with a centrality test would require "the same degree of compelling interest to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church.").

religion is bad policy, or an unconstitutional preference for religion, or both.[49] These people are mostly academics or secular activists. They have no votes in any legislature, and few votes in any court. The coalition that successfully argued for the Religious Freedom Restoration Act was wall-to-wall, religious and secular, left and right. And there are some two thousand specific exemptions in state and federal statute books, many of them not at all controversial.[50]

Those who oppose all exemptions are not always clear about their proposed solutions, but they offer a range of possibilities. Some at least imply that regulatory exemptions on grounds of conscience should be totally banned;[51] others leave open the possibility that exemptions should be permitted if granted to all people with intense personal objections to a law, religious and secular alike.[52] To those who say that any exemption from regulation violates the Establishment Clause, the answer to them is brief. Government does not establish a religion by leaving it alone; government does not benefit religion by

[49]*See* PHILIP B. KURLAND, RELIGION AND THE LAW 17–18, 40–41, 111–12 (1962) (arguing that the Religion Clauses prohibit any government classification based on religion, either to impose a burden or confer a benefit, including religious exemptions that lift regulatory burdens); Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 182–85 (1990) (arguing that regulatory exemptions for religion subordinate democratic control to nondemocratic, extrahuman force); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W.L. REV. 357 (1990) (arguing that exemptions are both unworkable and discriminatory); Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 123–24 (arguing that the Establishment Clause prohibits the exemptions that the Free Exercise Clause seems to require, so that one clause must be subordinated to the other); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 402 (endorsing Kurland's proposed ban on any benefit to religion as a class).

[50]James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445, n.215 (1992) (counting exemptions with online searches and sampling the results, and apparently including tax exemptions as well as regulatory exemptions).

[51]*See* Gey, *supra* note 49; Sherry, *supra* note 49.

[52]*See* KURLAND, *supra* note 49: Tushnet, *supra* note 49.

first imposing a burden through regulation and then lifting that burden through exemption, and, in most cases, such exemptions do not encourage anyone to engage in a religious practice unless he was already independently motivated to engage in the practice. The Supreme Court has repeatedly and unanimously rejected the argument that religious exemptions generally, or in principle, violate the Establishment Clause,[53] and eight Justices reaffirmed that view, with no dissent from the ninth justice, when the Court invalidated a particular exemption as discriminatory and not needed to relieve a regulatory burden on the free exercise of religion.[54] There is absolutely no support in the original understanding for the claim that exemptions raise Establishment Clause issues.[55] Whether it is more nearly neutral to leave religion alone or to treat it just like analogous secular activities is a question of baselines that is treated elsewhere.[56]

[53]Cutter, 544 U.S. 709; Grumet, 512 U.S. at 705; *id.* at 711–12 (Stevens., J., concurring); *id.* at 716 (O'Connor, J., concurring); *id.* at 723–24 (Kennedy, J., concurring); *id.* at 744 (Scalia, J., dissenting); Smith, 494 U.S. at 890; *id.* at 893–97 (O'Connor, J., concurring); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334–39 (1987); *id.* at 340–46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348–49 (O'Connor, J., concurring).

[54]Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (reaffirming *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38–40 (Scalia, J., dissenting) (arguing that exemptions are generally permitted and sometimes required). Justice White's brief opinion said nothing about the Establishment Clause issue. *Id.* at 25–26 (White, J., concurring).

[55]*See* Laycock, *supra* note 4.

[56]Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703–07 (1997) (arguing for a baseline of minimizing government incentives to change one's religious beliefs and practices in either direction); Laycock, *supra* note 39, at 349–52 (making substantially the same argument).

B. THOSE WHO WOULD PERMIT EXEMPTIONS ONLY IF ENACTED BY A LEGISLATURE

The more common opposition to exemptions is to argue that they can be created only by legislatures, but never by courts in the interpretation of a constitution. These opponents of exemptions divide into two further categories.

1. THOSE WHO WOULD PERMIT GENERAL LEGISLATION

Some would let legislatures enact general religious liberty statutes, such as a Religious Freedom Restoration Act (RFRA).[57] These acts say that no other law enacted under the authority of the same jurisdiction shall be applied in any way that substantially burdens the exercise of religion, unless that burden is the least restrictive means to serve a compelling government interest. The reference to laws of the same jurisdiction simply means that the federal RFRA applies to federal law, the Pennsylvania RFRA applies to Pennsylvania law, and so on.

This general formulation sends the problem back to the courts for detailed implementation, but with some important differences from the same compelling-interest test as a matter of constitutional interpretation. The courts act with a modern legislative mandate (and at least for a while, a recent legislative mandate). This legislative mandate addresses the exemption issue in more specific language than the language of the Free Exercise Clause. And because the right is statutory, it is subject to legislative

[57]Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) (arguing that state RFRAs are superior to either a rule of constitutional exemptions or to a rule of no exemptions).

amendment. If the legislature doesn't like the judicial interpretation that emerges, or even if it feels threatened by pending litigation or hypotheticals, it can amend its RFRA. State legislatures have exercised this power, not always wisely. Illinois amended its RFRA to make it inapplicable to the expansion of O'Hare Airport; the issue was condemnation of a cemetery.[58] Florida made its RFRA inapplicable to driver's license photos; the issue was Muslim women who refused to remove their veil.[59] Other limitations were included in state RFRAs from the time of their enactment. Florida and Pennsylvania excluded drug laws.[60] Missouri entirely, and Texas in part, excluded civil rights laws.[61] Missouri also excluded a more sensible list of cases defined by serious harm or at least a narrow category with a high likelihood of serious harm.[62] Pennsylvania excluded prisoner claims and a miscellaneous list of other claims that were unlikely to be successful in any event.[63] Oklahoma and South Carolina enacted a partial definition of "compelling interest" in prison cases;[64] these provisions are not really exceptions because few supporters of RFRAs would quarrel with the definitions. Oklahoma also provided that its RFRA does not create any right to same-sex marriage.[65] This proliferation of

[58]775 ILL. COMP. STAT. 35/30 (West Supp. 2009).
[59]FLA. STAT. ANN. § 322.142(1) (West 2005).
[60]FLA. STAT. ANN. § 761.05(4) (West 2005); PA. CONS. STAT. ANN. § 2406(g) (West Supp. 2009).
[61]MO. ANN. STAT. § 1.307.2 (West Supp. 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West Supp. 2009).
[62]MO. ANN. STAT. § 1.307.2 (West Supp. 2009) (causing physical injury to another person, withholding medical care from a child with a life-threatening condition, failing to pay child support, or possessing an illegal weapon).
[63]PA. CONS. STAT. ANN. § 2406(b) (West Supp. 2009) (excluding most motor vehicle laws, medical licensing, construction codes, and regulation of health facilities).
[64]OKLA. STAT. ANN. tit. 51, § 254 (West 2001); S.C. CODE ANN. § 24–27–500 (West 2007).
[65]OKLA. STAT. ANN. tit. 51, § 255.2 (West 2001).

exceptions threatens the underlying policy of RFRAs, which is to subject all claims to the same standard and decide the compelling-interest issue on a case-by-case basis, but such exceptions also show that the legislature really does remain in charge.

2. THOSE WHO WOULD REQUIRE LEGISLATURES TO LEGISLATE CASE-BY-CASE

Other opponents of judicial exemptions say that neither a modern legislative mandate, nor leaving final authority to the legislature, is enough to justify a general standard for the grant of exemptions. They insist that the legislature must strike the balance itself and enact specific rules for every instance of conflict between religious practice and secular law.[66] On this view, a general statutory protection for religious liberty, such as a RFRA, is bad policy, or unconstitutional, or both. This claim is supported on various bases: institutional competence, political legitimacy, alleged original understanding, and alleged separation-of-powers limits on the scope of a bill. It is not possible to explore all these

[66] MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 9–11, 175–77, 288, 299–302 (2005). I think that this is also Ellis West's position. *See* Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990). Professor West focuses on explaining why he believes there is no constitutional right to exemptions, and while he clearly accepts legislative exemptions, he gives little detail about the scope of what he would accept. *See id.* at 634–36.

There are also people who do not attack religious exemptions as such but argue that based on enumerated powers, or separation of powers, Congress must enact exemptions (if at all) on a case-by-case basis. The separation of powers version of the argument would seem to apply to state legislators as well. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 119–38 (1996); Edward Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410 (1998). Marci Hamilton, who does attack exemptions as such, also makes these arguments. Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 1–7, 14–19 (1998). These arguments are answered in Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 727–47 (1998).

arguments in a single brief lecture, but I want to explore some of the most important points of difference.

Such case-by-case legislation is obviously unworkable as a matter of legislative calendars and attention spans, and it does not appear to be the Supreme Court's position. The Court unanimously upheld the Religious Land Use and Institutionalized Persons Act against Establishment Clause attack,[67] and it has shown no interest in constitutional attacks on the Religious Freedom Restoration Act as applied to federal law.

The most prominent proponent of the view that legislators must enact exemptions case-by-case or not at all is Professor Marci Hamilton. She and I disagree about many things. She is a believer who seems profoundly hostile to religion and religious liberty. I am a nonbeliever who seeks to protect the conscience of believers and nonbelievers alike. Setting aside psychological explanations and underlying attitudes toward religion, the most fundamental disagreement between us comes down to the question of institutional competence. For purposes of striking the balance between religious liberty and the risk of harm to others, she says, "the only legitimate branch is the legislature."[68]

As I have explained in more detail elsewhere, her faith in legislatures is incomprehensible, because she has little good to say about them.[69] Legislators have exempted harmful religious behavior that no judge would ever exempt under a generally applicable standard—most notably, parents refusing to provide medical care for their

[67]Cutter, 544 U.S. 709.
[68]HAMILTON, *supra* note 66, at 297.
[69]Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007) (reviewing HAMILTON, *supra* note 66).

children.[70] Preserving the life and health of children is clearly a compelling interest, because a child is not old enough to decide for herself whether to forgo the benefits of modern medicine as an act of faith. No court has had any trouble with that issue, but legislatures have repeatedly gotten it wrong.

Legislators are also prone to err in the other direction. *Church of the Lukumi*[71] is now recognized, almost universally by people in the field—even by Professor Hamilton[72]—as a clear case of discriminatory regulation that was unconstitutional. The ordinances were carefully drafted to prohibit the sacrifice of animals without interfering with any secular reason for killing animals. They were struck down 9–0 in the Supreme Court. The case was pending in the Supreme Court while Congressional attention was focused on religious liberty issues, and Rep. Steve Solarz of New York tried to arrange for a Congressional amicus brief supporting the church. He could not get a single Congressman to even talk to him about it.[73] It didn't matter that the laws were discriminatory and that the practice was harmless—or at least, harmless to humans and no more harmful to animals than a wide range of secular practices. All that mattered was that the practice seemed unlikely to play well with constituents.

Legislatures sometimes reach bad decisions because of defects in the legislative process, and Professor Hamilton complains about the process too. "Too often, the

[70]Hamilton and I agree that legislatures have gotten this issue seriously wrong, although she badly misstates what legislatures have actually done. *See id.* at 1173; HAMILTON, *supra* note 66, at 32, 321–22 n.84.
[71]Lukumi, 508 U.S. 520.
[72]HAMILTON, *supra* note 66, at 214–15.
[73]Interview with David Lachman, an attorney on the staff of Rep. Solarz, in Washington, D.C. (May 14, 1992).

determination is made in the back halls,"[74] or by riders in unrelated bills.[75] She says that legislators are "constitutionally ill-informed,"[76] often "muddle-headed about religion,"[77] and often "captured by special interests and incapable of acting in the public's interest."[78] Yet these are the only people she trusts to exempt religious practice from regulation.

Her principal argument for legislative supremacy is a romantic faith in the investigative power of legislative hearings.[79] Legislators *can* do serious investigations, but they rarely do. The typical Congressional hearing consists of witnesses and representatives reading brief, prepared statements followed by brief, prepared questions. Few committee members are prepared to ask probing follow-up questions. Supporters and opponents of the bill do not necessarily get equal time. There is no lead advocate for each side who can marshal the evidence or cross-examine the other side's witnesses. If the issue has not attracted television cameras, many committee members do not attend, or they arrive late and leave early, but they are still entitled to vote.

Sometimes this hearing process appears to persuade legislators about the need for a bill. But more often, legislators make up their minds about facts, policy, and how to vote on the basis of off-the-record discussions with colleagues, lobbyists, donors, and

[74] HAMILTON, *supra* note 66, at 300.
[75] *Id.* at 9.
[76] *Id.* at 301.
[77] *Id.* at 165.
[78] *Id.* at 298.
[79] *Id.* at 296–97.

constituents, or on the basis of pre-existing ideological commitments that cannot be shaken by any amount of evidence.[80]

This process is probably the best we can do for some questions. Much legislation affects many interests, some of them directly and some indirectly, some of them known and some of them unknown. All these interests are free to lobby, threaten, contribute or withhold money, urge their constituents to contact their legislators, and try to influence the process in any other way they can imagine. The resulting free-for-all may not be very reliable, but at least every group that knows and cares about the bill can try to make itself heard. The greater procedural protections of the judicial process break down in the face of so many competing interests. Due process becomes impossible, and so we dispense with it.[81]

Moreover, the arguments in these legislative battles are often competing predictions about the future consequences of complex choices, not questions that can be answered with any evidence about specific events or discrete acts. No one predicts the future very well, but the legislature can at least reflect the balance of competing forces, even if its predictions and its fact finding do not inspire confidence.

Judicial decision-making has a different set of strengths and weaknesses. Judicial fact-finding is at its best when a question of fact can be stated with some specificity in an

[80]The description of legislative hearings in this section is based principally on personal experience in testifying at more than a dozen hearings on religious liberty legislation in the 1990s and 2000s, and on discussions with legislative staffers growing out of those appearances.

[81]Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that there is no right to be heard with respect to adoption of legislation or administrative rules that apply "to more than a few people").

adversarial format, with two sides advocating squarely alternative positions. A claim to religious exemption addresses a specific religious practice, to be performed under specific circumstances, recognizing that any exemption will extend to all similar practices and circumstances that cannot be honestly distinguished. The question whether such an exemption will do any harm, and how much, is reasonably focused and well-suited to adversary presentations. It can often be addressed on the basis of whether the religious practice *has* caused harm when it has been permitted. Judicial fact-finding is prone to its own kinds of errors; it is far from perfect. But presented with a focused issue and two interested parties, I have no doubt that judicial fact finding is more reliable than legislative fact finding.

In addition to the procedural differences, there is a vast difference in human resources. There are far more judges than legislatures, and trial judges hear cases one judge at a time, not in committees. A trial judge can devote far more time and attention to a specific dispute over religious liberty than any legislature can ever devote.

Hamilton emphasizes relative competence at fact finding; Justice Scalia emphasizes the more traditional argument that courts should not balance competing interests after the facts are found.[82] But here, the judiciary's obligation to state reasons and do equal justice to all is a real advantage over the legislature's vulnerability to lobbyists and political pressure. The reality of the legislative process is totally unsuited to principled decisions about whether one faction's desire to suppress an annoying religious practice is really

[82]Smith, 494 U.S. at 887, 890 n.4.

necessary to the public interest. That statement is true whether the standard of necessity is the least restrictive means of serving a compelling government interest, or a reasonable fit with a substantial interest, or even a rational basis not driven by bigotry or hostile indifference to religious minorities.

Judges *sometimes* are willing to protect unpopular minorities, but legislators are hardly ever willing—not if the legislature has to legislate specifically about the unpopular minority and its religious practices. Legislators cannot afford to overtly protect any group that is seriously unpopular with voters, so they are least likely to protect those religious minorities who are most in need of protection. The only way for legislators to protect these unpopular religions is to include them in a broad statement of principle, such as a Religious Freedom Restoration Act. The legislative and judicial processes have different strengths and weaknesses, and the principal benefit of judicial review is that it gives constitutional claims a chance to be heard in each forum.

C. THOSE WHO WOULD PERMIT EXEMPTIONS CONSISTENT WITH "EQUAL LIBERTY"

Let me turn, briefly, to those who oppose all existing provisions for religious exemptions but would permit many exemptions on other terms. Larry Sager, my Dean at Texas, and Christopher Eisgruber, the Provost at Princeton, have proposed a theory that they call "Equal Liberty."[83]

[83]CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

The equality half of the theory begins like the Supreme Court's opinion in *Smith*.[84] They say that "the Court was entirely correct in rejecting the idea that religiously motivated persons are presumptively entitled to disregard the laws that the rest of us are obliged to obey."[85] Religion should get no special protection under the Constitution; it is protected only against discrimination. They also find regulatory exemptions unworkable[86] and the balancing of governmental and religious interests unworkable.[87]

This is not the time or place for a full response to Sager and Eisgruber's deeper theoretical argument for their position. However, I want to address the proposed implementation of their position, which has implications that are not so hostile to exemptions after all. Sager and Eisgruber offer a creative interpretation of what it means to treat religious exercise equally with similar secular activities. They insist that religious commitments should be treated equally with comparably serious secular commitments, so they would require exemption whenever government exempts a comparably serious religious or secular commitment from the same regulation.[88] It surely follows a fortiori that they would require exemption when government exempts a less serious commitment or activity from the same law. This approximates the best understanding of the Supreme

[84]Smith, 494 U.S. 872.
[85]EISGRUBER & SAGER, *supra* note 83, at 96.
[86]*Id.* at 82–83.
[87]*Id.* at 85–86.
[88]*Id.* at 90–91 (favorably discussing *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)).

Court's requirement of neutral and generally applicable laws under *Employment Division v. Smith*.[89]

Going further, they would require exemption whenever the government exempts a comparably serious religious or secular commitment from a similar regulation: for example, sacramental wine can be analogized to peyote, and an exemption for one may require an exemption for the other.[90] Yarmulkes, once banned on Illinois high school basketball courts, can be analogized to eyeglasses; both are a form of headgear that might fall off.[91] In principle, they would require religious exemptions if there are comparable exemptions from a not-so-similar regulation; they have analogized peyote exemptions and family-leave laws to Social Security exemptions, while recognizing that "[s]uch comparisons will defy judicial resolution."[92]

Finally, they would require religious exemptions if the judge predicts that government *would* exempt a comparably serious mainstream interest if the issue ever came up.[93] This is how they treat *Lyng v. Northwest Indian Cemetery Protective Association*,[94] a case where the government wanted to build a road for lumber trucks through isolated land sacred to certain Native Americans. Sager and Eisgruber believe that the government would not have built the road if the land had been sacred to Catholics

[89]*See supra* notes 19–20 and accompanying text (describing the circuit split on the meaning of "generally applicable").
[90]*Id.* at 92–93.
[91]*Id.* at 91.
[92]Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 459 (1994).
[93]EISGRUBER & SAGER, *supra* note 83, at 91–92.
[94]485 U.S. 439 (1988).

or Jews or if it had contained a stand of redwoods of special importance to environmentalists.[95]

How are we supposed to make that prediction? The only way I can see to do it is by assessing the importance of the government's interest. If this is an interest where we can afford to make exceptions without doing much harm, then we probably would make exceptions for a well-connected interest group. If this is an interest that is so important that no exceptions can be tolerated, then we would deny an exception, no matter who is asking. The compelling interest test asks that question directly. Sager and Eisgruber have reached nearly the same point as the compelling interest test, with much more complexity.[96]

It is hard to say just how close to the compelling interest test they come. On the one hand, they reject the compelling interest test as too stringent;[97] on the other, they claim that their test will provide "more robust protection" than the compelling interest test, because that test was so stringent that judges refused to apply it.[98] But if the compelling interest test produced judicial rebellion, and if their test is even more protective, why would it not also produce judicial rebellion? Their answer is that the compelling interest discriminated in favor of religion and overrode democratic decision

[95] EISGRUBER & SAGER, *supra* note 83, at 92.
[96] *See* Thomas C. Berg, *Can Religious Liberty Be Protected as Equality*, 85 TEX. L. REV. 1185, 1191–204 (2007) (reviewing EISGRUBER & SAGER, *supra* note 83) (making similar points and important additional points that extend the analysis much further).
[97] EISGRUBER & SAGER, *supra* note 83, at 82–85.
[98] *Id.* at 280.

making, but their test does neither.[99] There is something to that, but it will remain the case that their test grants exemptions to some and denies exemptions to others, and that when it grants exemptions through litigation, it will override democratic decision making. If it does this often enough to be more protective than the compelling interest test in practice, then we should still expect it to produce judicial disagreement, with vigorous enforcement by some judges and vigorous resistance by others. Judicial resistance is almost impossible to stamp out, no matter how carefully one drafts,[100] but Sager and Eisgruber's complex methodology, with its dependence on wide-ranging and even hypothetical analogies, makes resistance easy.

The Sager-Eisgruber test would not be nearly so protective in the hands of judges as it is in the hands of Sager and Eisgruber. It is hard to imagine many judges being so creative and imaginative with their analogies as Eisgruber and Sager are with theirs. On the other hand, judges are no doubt more comfortable striking down discrimination than requiring exemptions. When judges can see the analogy, the Sager-Eisgruber model makes a much stronger case for exemption. When the analogy runs too far, it makes for a much weaker case. Sager and Eisgruber insist that the case for exemptions depends on the analogy to some other exemption that the legislature did grant or would have granted, and when that analogy is too strained for courts to accept, their case for exemption collapses.

[99] *Id.*

[100] *See, e.g.*, Warner v. City of Boca Raton, 887 So. 2d 1023, 1032–34 (Fla. 2004) (nullifying by artful interpretation the carefully drafted protection in the Florida RFRA for practices that are religiously motivated but not religiously compelled).

Part of our disagreement is about the merits: I would grant exemptions in some cases where they would not. But part of our disagreement is about the meaning of the compelling interest test, which they misunderstand in a fundamental way. They think that the compelling interest test is "a relatively absolute standard,"[101] appropriate in free speech cases but not in free exercise cases, because free exercise cases are about conduct.[102] They never quite say that an honest application of the compelling interest test is "'strict' in theory and fatal in fact,"[103] but that seems to be their assumption. This is mistaken. The same standard of very strong justification that is fatal in most cases of discrimination or censorship of speech is not so frequently fatal when applied to conduct, precisely because conduct is more likely to cause harm. "[R]eligious believers have no right to inflict significant harm on nonconsenting others,"[104] and when they threaten to do so, the compelling interest test is satisfied. A uniform compelling interest test is measured by "uniform application of the 'compelling interest' *test* to all . . . claims, not by reaching uniform *results* as to all claims."[105]

[101]EISGRUBER & SAGER, *supra* note 83, at 85.
[102]*Id.* at 109.
[103]This famous formulation originated with Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
[104]Laycock, *supra* note 69, at 1171.
[105]Smith, 494 U.S. at 918 (Blackmun, J., dissenting).

IV. EXEMPTIONS AS DISCRIMINATION AGAINST THE NONRELIGIOUS

We finally come to what seems to me to be the core of the argument against exemptions—discrimination between religious and secular claims of conscience. First, it is important to specify the relevant comparison. I am quite prepared to agree that less regulation of people's personal lives would be a good thing, and even that less regulation in general—more and smarter regulation in a few areas, less and smarter regulation in many others—would be a good thing. But it does not follow that protection against all that regulation is found in the Constitution. Religion is protected in the Constitution; most other activities are not. There was good reason for that choice; within the living memory of the Founders, two hundred years of religious warfare had finally ended.

There is, in my view, no relevant discrimination between religion and everything that is not religion—between religion and family, religion and job or profession, religion and aesthetics, religion and recreation, and so on. We have never had, in the Founders' time or in our own, civil war, persecution, or even deep and widespread social conflict over family or employment obligations or aesthetic or recreational preferences. Religious people are not constitutionally protected with respect to these commitments, and secular people are not protected either. These human needs may be a reason for less regulation of individuals in general, or for more accommodating management policies by employers. But they are not the basis for a workable scheme of judicially enforceable exemptions, and claims to exemptions on these grounds have no basis in the text or history of the Constitution.

The relevant discrimination is treating people differently *because of* their differing answers to religious questions. Suppose we say that your right to conscientious objection to government demands on your behavior is *protected*—subject to the compelling interest exception—if you attribute your conscientious obligation to the teachings of a religion, but the same claim of conscience is *unprotected* if you doubt or deny the existence of God and attribute your claim of conscience to the equality of all humans or the categorical imperative or some other principle of secular morality. *That* is discrimination on the basis of belief about religion. If you changed your religious belief you would be protected. So in the Vietnam-era draft cases, the Supreme Court said that conscientious objectors to war in any form are protected, whether they are Quakers, or Episcopalians, or atheists.[106] Justice O'Connor repeated the point, in dictum, in her concurring opinion in *Board of Education v. Grumet* in 1994.[107] We should protect claims of conscience, and we should protect all beliefs about God—not only those beliefs that affirm God's existence. We should protect the moral commitments of religious believers, and we should also protect the moral commitments of nonbelievers when those commitments are held with religious intensity.

Nonbelievers have many moral commitments, and they hold some of those commitments with religious intensity. But they do not hold many intense moral

[106]Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion); Seeger v. United States, 380 U.S. 163 (1965).

[107]Grumet, 512 U.S. at 716 (O'Connor, J. concurring) ("A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to non-theistic belief (such as Buddhists) or atheistic belief.").

commitments that are at odds with the dominant morality reflected in government policy. Nonbelievers tend to have a modern sensibility. They do not draw their morality from ancient books written in a radically different culture that lived with radically different technology and had a radically different understanding of the world; they do not obey an omnipotent, omniscient God whose commands may be beyond human understanding. On the whole, nonbelievers take their morality from the same modern milieu that drives democratic decision making and government regulation. It is no accident that military service is the only prominent example where serious claims of nontheistic conscientious objection have been litigated.

We can easily imagine other examples, but few realistic examples would squarely present the issue. Environmental activists, and animal-rights activists, may have profound moral objections to certain government policies, but they are rarely asked to actively participate in carrying out those policies. Unless an animal rights activist goes to veterinary school,[108] or works in an animal research lab, he is unlikely to be asked to violate his conscience. And if he seeks conscientious objector protection for illegal acts of protest—vandalism, destruction of labs, theft of lab animals, assaults on researchers—he will lose on compelling interest grounds, just as a religious objector would. No conscientious objector, religious or secular, gets to impose his views on others or attack

[108]*See* Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993) (rejecting a veterinary student's claim under the hybrid rights exception to *Employment Division v. Smith*). Her objection to learning to operate on live animals is described as "because of her religious beliefs," *id.* at 178, but those beliefs are not further described.

the persons or property of those who disagree with him. No doubt cases would arise that do not involve military service, but there would not be many.

With the military draft suspended, there are hardly any cases filed by nonbelievers asserting claims of conscience. I know from conversations I have had with judges that many of them would be reluctant to entertain such claims. Their predecessors granted exemptions in the draft cases, but those cases are forty years old and interpreted a particular statute. The draft cases may be persuasive, but they are not binding with respect to other statutes or with respect to constitutions. Chief Justice Burger's opinion in *Wisconsin v. Yoder* is widely read as repudiating Constitutional protection for nonbelievers, but it can also be read as distinguishing claims of conscience from mere policy disagreements.[109] Courts have been willing to protect nontheistic organizations that serve religious functions from discrimination with respect to religious tax exemptions. Chief Justice Burger did it as a Circuit Judge in 1957;[110] the Texas courts did it in this decade.[111] The principle example here is Ethical Culture, although the Texas litigation expanded to include Unitarians.

Courts are less comfortable with regulatory exemptions, and less willing to interpret them generously. They are more likely to revert to the intuition that nontheistic beliefs are not "religion" in ordinary usage, and therefore, not "religion" either in the

[109]406 U.S. at 215–16 (stating that claims under the Religion Clauses "must be rooted in religious belief," and that Henry David Thoreau's beliefs would not have counted, but acknowledging that what does count "may present a most delicate question").
[110]Wash. Ethical Soc'y v. D.C., 249 F.2d 127 (D.C. Cir. 1957).
[111]Strayhorn v. Ethical Soc'y of Austin, 110 S.W.3d 458 (Tex. Ct. App. 2003).

Constitution, or in religious liberty statutes. That was certainly the reaction of a group of judges with whom I discussed the matter at a continuing legal education conference.

Some of those judges also had the competing intuition, not necessarily inconsistent but certainly in tension with the first intuition, that disbelief in God is functionally just like religion. It is simply another way of thinking about religious questions. And so, it would be unconstitutional discrimination to protect religious claims of conscience but not secular claims of conscience.[112] For these judges, because they are unwilling to protect everybody, and also unwilling to discriminate, they refuse to protect anybody. This logic leads to the worst of all possible worlds—the equality of universal suppression. In the pursuit of equality for all, it offers liberty for none.

Justice Stevens has come the closest to this view on the Supreme Court,[113] but he has not been consistent about it. He has joined in three unanimous judgments holding (or stating) that legislated religious exemptions are consistent with the Establishment Clause,[114] and he joined the unanimous opinion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[115] broadly enforcing the federal Religious Freedom

[112]Few judges say this in opinions, because the Supreme Court authority is so clearly to the contrary. An opinion that comes close is Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), *rev'd*, Cutter, 544 U.S. 709.
[113]*See* Boerne, 521 U.S. at 536–37 (Stevens, J., concurring) (arguing that RFRA violates the Establishment Clause); United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (arguing for "an almost insurmountable burden" on any claimant seeking an exemption from "a neutral law of general applicability").
[114]Cutter, 544 U.S. 709 (joining the opinion of the Court); Grumet, 512 U.S. at 711–12 (1994) (Stevens, J., concurring); Amos, 483 U.S. 327 (joining the opinion of the Court).
[115]546 U.S. 418 (2006).

Restoration Act and ignoring the Establishment Clause challenge raised by Professor Hamilton in an amicus brief.[116]

Broad religious liberty statutes are sufficiently difficult to enact that supporters have not complicated their task by urging that nonbelievers be explicitly included. And undoubtedly some of the supporters of those statutes would not want to grant the same protection to nonbelievers. The Puritan mistake is sometimes still with us—religious liberty for my religion, and for sufficiently similar religions, but not for religions or religious views that are too different or too unacceptable.[117]

Fortunately, the history of religious liberty in America is a history of an ever expanding circle of inclusion, both social acceptance and legal protection. At first, in England and in many of the colonies, only the established church was recognized. Then came religious liberty and social acceptance for all Protestants, or in some places, all Trinitarian Protestants. Then Catholics were included; then Jews. We are now in the very process with Muslims—legally protected but still fighting for full social acceptance and full implementation of their legal protections. My impression is that Hindus and Buddhists are a little further along, better accepted because they are not under the shadow of radical co-religionists waging war against the United States.

[116]Brief for The Tort Claimants' Committee as Amici Curiae Supporting Neither Party, O Centro, 546 U.S. 418 (2006), 2005 WL 1630009.

[117]The original Puritan mistake was that when they came to Massachusetts for religious liberty, they allowed religious liberty only for themselves. *See* Laycock, *supra* note 39, at 352–53.

That circle will expand to include nonbelievers. Hostility to atheists in opinion polls is still substantial,[118] but nonbelievers are likely to make themselves accepted by the sheer force of numbers. In the largest survey, the number of Americans reporting themselves as having no religion is up to 15%, or more than 34 million people.[119] Another 5.2% refused to answer or said they did not know their religious identity,[120] and these people tended to resemble those with no religion.[121] Only 1.6% explicitly identified themselves as atheists or agnostics,[122] but 12.3% said that there is no God, that there is no way to know whether there is a God, or that they were unsure whether there is a God.[123] Among the population as a whole, 26% report that they had no religious initiation ceremony (such as a baptism, confirmation, or bar mitzvah), 27% expect no religious funeral, and 30% of married people had no religious wedding.[124] For the first time in history, a President feels free to publicly acknowledge nonbelievers.[125]

Nonbelievers are breaking in to the expanding circle of toleration and religious liberty. If that circle contains regulatory exemptions for claims of conscience, nonbelievers will eventually get that protection too. But if nonbelievers use their

[118]*See* Penny Edgell, Joseph Gerteis, & Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211 (2006) (finding that atheists have not been included in the general increase in tolerance for racial and religious minorities).
[119]BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY: SUMMARY REPORT 3, tbl. 1 (2009), *available at* http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.
[120]*Id.*
[121]*Id.* at 3.
[122]*Id.* at 5, tbl 3.
[123]*Id.* at 8, tbl. 4.
[124]*Id*. at 10, tbl. 6.
[125]Barack Obama, *Inaugural Address* (Jan. 21, 2009), *available at* http://www.whitehouse.gov/blog/inaugural-address. ("We are a nation of Christians and Muslims, Jews and Hindus, and non-believers.").

emerging influence among elites to beat back regulatory exemptions for believers—if out of envy or hostility they destroy the right to act on one's religious beliefs—they will move into a hollowed out circle of tolerance that has no protection for claims of conscience—not for believers and not for nonbelievers either. And then their deepest moral commitments will be as legally unprotected as the moral commitments of believers.

V. CONCLUSION

Regulatory exemptions are an essential part of meaningful religious liberty. The right to believe a religion is hollow without the right to practice the religion; it leaves committed believers subject to persecution for exercising their religion. The various attacks on religious exemptions are not persuasive. Not only can courts handle these cases; they can usually handle them better than legislatures, because they accord due process to both sides. The reluctance to extend full and equal protection to the deep moral commitments of nonbelievers is troubling. But the answer to that problem is to keep pushing for full and equal liberty for all, not for full and equal suppression of any minority that cannot push a bill through all the legislatures with power to regulate it.